

1
2
3 UNITED STATES DISTRICT COURT
4 EASTERN DISTRICT OF WASHINGTON

5 JOSEPH R. ROBICHAUD,

6 Plaintiff,

7 -vs-

8 CAROLYN W. COLVIN, Commissioner
9 of Social Security,¹

10 Defendant.

NO. CV-11-0069-WFN

ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

11 Before the Court are cross-Motions for Summary Judgment (ECF Nos.15 and 19).
12 Attorney Maureen Rosette represents Plaintiff Robichaud; Special Assistant United States
13 Attorney Pamela DeRusha represents Defendant. After reviewing the administrative record
14 and the briefs filed by the parties, the Court **DENIES** Plaintiff's Motion for Summary
15 Judgment, and **GRANTS** Defendant's Motion for Summary Judgment.

16 **BACKGROUND**

17 Plaintiff filed a claim on March 20, 2007, alleging an onset of disability as of
18 January 16, 2006. The claim was initially denied on June 21, 2007, and upon reconsideration
19 on December 6, 2007. Plaintiff was granted a hearing on May 6, 2009, before Administrative
20 Law Judge (ALJ) Chester. Plaintiff and vocational expert Moreland testified at this hearing.

21
22 ¹ Carolyn W. Colvin became the Acting Commissioner of Social Security on
23 February 14, 2013. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure,
24 Carolyn W. Colvin is substituted for Michael J. Astrue as the defendant in this suit. No
25 further action need be taken to continue this suit by reason of the last sentence of 42 U.S.C.
26 § 405(g).

ORDER GRANTING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT - 1

1 In his May 28, 2009, decision, the ALJ found Plaintiff was not disabled. This appeal
 2 followed. This Court has jurisdiction pursuant to 42 U.S.C. § 405(g).

3 STANDARD OF REVIEW

4 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the court set out the
 5 standard of review:

6 The decision of the Commissioner may be reversed only if it is not supported
 7 by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d
 8 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more
 9 than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another
 10 way, substantial evidence is such relevant evidence as a reasonable mind
 11 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
 12 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
 13 interpretation, the court may not substitute its judgment for that of the
 14 Commissioner. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social*
 15 *Sec. Admin.* 169 F.3d 595, 599 (9th Cir. 1999).

16 The ALJ is responsible for determining credibility, resolving conflicts in
 17 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d
 18 1035, 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de*
 19 *novo*, although deference is owed to a reasonable construction of the applicable
 20 statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).

21 *Id.*

22 It is the role of the trier of fact, not this court, to resolve conflicts in evidence.
 23 *Richardson*, 402 U.S. at 400. If evidence supports more than one rational interpretation, the
 24 court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at
 25 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984). Nevertheless, a decision
 26 supported by substantial evidence will still be set aside if the proper legal standards were not
 applied in weighing the evidence and making the decision. *Browner v. Secretary of Health*
and Human Services, 839 F.2d 432, 433 (9th Cir. 1988). If substantial evidence exists to
 support the administrative findings, or if conflicting evidence exists that will support a
 finding of either disability or non-disability, the Commissioner's determination is conclusive.
Sprague v. Bowen, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

SEQUENTIAL PROCESS

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a), 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one through four, the burden of proof rests upon the claimant to establish a prima facie case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99. This burden is met once a claimant establishes that a physical or mental impairment prevents him from engaging in his previous occupation. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). If a claimant cannot do his past relevant work, the ALJ proceeds to step five, and the burden shifts to the Commissioner to show that (1) the claimant can make an adjustment to other work; and (2) specific jobs exist in the national economy which claimant can perform. *Batson v. Commissioner of Social Sec. Admin.*, 359 F.3d 1190, 1193-94 (2004). If a claimant cannot make an adjustment to other work in the national economy, a finding of "disabled" is made. 20 C.F.R. §§ 404.1520(a)(4)(I-v), 416.920(a)(4)(I-v).

STATEMENT OF FACTS

The facts of the case are set forth in detail in the transcript of proceedings, and are briefly summarized here. Plaintiff was 42 years old at the time of his alleged disability onset. He completed high school and has worked in the past as a sign reader, molding machine operator, assembler, electronic supervisor and solderer.

ADMINISTRATIVE DECISION

At step one, the ALJ determined that Plaintiff performed some part time work after January 16, 2006, but the work did not constitute substantial gainful employment. At step two, the ALJ concluded that Plaintiff had the following severe impairments: right shoulder strain, lumbar strain, and degenerative disk disease lumbar and cervical spine. At step three, the ALJ found that Plaintiff did not have an impairment or combination of impairments that met or medically equaled any of the listed impairments described

1 at 20 C.F.R. Part 404, Subpart P, Appendix 1(20 CFR 404.1520(d), 404.1525,
2 404.1526).

3 At step four, the ALJ found that Plaintiff had "the residual functional capacity to
4 perform light work as defined in 20 CFR 404.1567(b) with the following limitations:
5 occasionally climb ladders/ropes/scaffolds, do occasional stooping and crawling; and
6 occasional overhead reaching bilaterally" (ECF No. 10-2 at 21). Notably, the ALJ found
7 that Plaintiff's medically determinable impairments could reasonably be expected to cause
8 the alleged symptoms, but that Plaintiff's statements concerning the intensity, persistence,
9 and limiting effects of these symptoms were not credible to the extent that they are
10 inconsistent with the residual functional capacity assessment.

11 At step five, the ALJ considered Plaintiff's residual functional capacity, age, education,
12 and work experience. The ALJ concluded that Plaintiff's past work does not require the
13 performance of work-related activities precluded by the claimant's residual functional
14 capacity. The ALJ found that Plaintiff retained the residual functional capacity to perform
15 past relevant work as a sign reader, molding machine operator, assembler, electronic
16 supervisor, and solderer.

17 ISSUES FOR REVIEW

18 The Plaintiff presents the following issues with respect to the ALJ's findings:

19 1. Did the ALJ err at step three by concluding that Plaintiff's impairments did not
20 meet or equal Listing 1.04?

21 2. Did the ALJ properly consider and address the medical evidence?

22 **1. Did the ALJ err at step three by concluding that Plaintiff's impairments did**
23 **not meet or equal Listing 1.04.**

24 In his Motion for Summary Judgment, Plaintiff briefly argues that the ALJ erred at
25 his step three analysis when he failed to find Plaintiff's impairments met or equaled the listing
26 in 20 CFR Part 404, Subpart P, Appendix 1, Listing 1.04. 1.04 states:

1 *Disorders of the spine* (e.g., herniated nucleus pulposus, spinal arachnoiditis,
2 spinal stenosis, osteoarthritis, degenerative disc disease, facet arthritis, vertebral
3 fracture), resulting in compromise of a nerve root (including the cauda equina)
or the spinal cord. With:

4 A. Evidence of nerve root compression characterized by *neuro-anatomic*
5 *distribution of pain, limitation of motion of the spine, motor loss* (atrophy with
6 associated muscle weakness or muscle weakness) accompanied by sensory or
reflex loss and, if there is involvement of the lower back, positive straight-leg
raising test (sitting and supine);

7 or

8 B. Spinal arachnoiditis, confirmed by an operative note or pathology report of
9 tissue biopsy, or by appropriate medically acceptable imaging, manifested by
severe burning or painful dysesthesia, resulting in the need for changes in
position or posture more than once every 2 hours;

10 or

11 C. Lumbar spinal stenosis resulting in pseudoclaudication, established by
12 findings on appropriate medically acceptable imaging, manifested by chronic
13 nonradicular pain and weakness, and resulting in inability to ambulate
effectively, as defined in 1.00B2b.

14 *Id.* (emphasis added).

15 The Court begins by noting that the ALJ expressly considered whether Plaintiff's
16 impairments met or equaled Listing 1.04. Specifically, the ALJ concluded that Plaintiff
17 failed to meet Listing 1.04 because the record does not demonstrate compromise of a nerve
18 root or spinal cord with additional findings in subsection A, B or C.

19 As stated *supra*, Plaintiff has the burden of proof at step three. When an impairment
20 meets or equals a listed impairment there is no consideration of age, education and work
21 experience.² "It is not enough for an applicant to show he has a severe impairment that is

22
23 ²20 C.F.R. § 404.1520(d) states: "When your impairment(s) meets or equals a listed
24 impairment in appendix 1.

25 If you have an impairment(s) which meets the duration requirement and is listed in
26 appendix 1 or is equal to a listed impairment(s), we will find you disabled without

1 one of the listed impairments to find him *per se* disabled. An applicant must show that his
2 impairment meets or equals the severity . . . requirements for the applicable impairment."
3 *Young v. Sullivan*, 911 F.2d 180, 181 (9th Cir. 1990).

4 Plaintiff argues that the ALJ erred because Dr. Demakas' evaluation showed that
5 Plaintiff has anatomic distribution of pain, limitation of motion of the spine, and motor loss,
6 as well as positive Waddell signs. Specifically, on August 14, 2007, Dr. Demakas found
7 spinal stenosis at L4-5 and left L5 radiculopathy, and Waddell's testing was positive 3/5.
8 A later MRI showed congenital narrowing of the spinal canal as well as foraminal narrowing
9 at C5-6.

10 Defendant notes that Plaintiff's argument focuses on alleged evidence of nerve root
11 compression, characterized by the symptoms noted above (anatomic distribution of pain,
12 limitation of motion of the spine, and motor loss). However, after the August 14, 2007,
13 appointment, Plaintiff underwent a limited bone/SPECT scan of the lumbar and cervical
14 spine. The scan images, as verified by Dr. Demakas, detected only mildly increased activity
15 at L4-5 likely related to mild degenerative disc disease (TR 550). The activity in the C5-6
16 region was also consistent with degenerative changes. Defendant argues that it is significant
17 that Dr. Demakas only recommended conservative care and saw nothing that "requires
18 neurosurgical intervention at this time" (TR 552). Defendant contends that the ALJ did not
19 err and that the medical evidence does not support a finding that Plaintiff's condition met or
20 equaled the requirements of Listing 1.04.

21 The Court agrees with Defendant and concludes that the medical facts do not establish
22 an impairment which is severe enough to find a *per se* disability.³ The Court concludes that

23 _____
24 considering your age, education, and work experience."

25 ³The Court further notes that Plaintiff repeatedly relies on the fact that Dr. Demakas
26 found positive Waddell's testing (3/5). Plaintiff alleges that this buttresses his conclusion

1 the ALJ did not err at his step three analysis when he failed to find Plaintiff's impairments
2 met or equaled the listing in 20 CFR Part 404, Subpart P, Appendix 1, Listing 1.04.

3 **2. Did the ALJ properly consider and address the medical evidence?**

4 Plaintiff also argues that the ALJ failed to properly consider and address the medical
5 evidence in Plaintiff's case. Specifically, Plaintiff focuses on the medical opinions of Dr.
6 Demakas, Dr. Van Gerpen and Dr. Lahtinen (ECF No. 16 at 12). The Court will address each
7 in turn.

8 **a. Dr. Demakas.**

9 Plaintiff notes that the ALJ gave significant weight to Dr. Demakas' opinion, and that
10 Dr. Demakas on August 14, 2007, did not think it was reasonable for Plaintiff to go back to
11 work and that on September 17, 2007, Dr. Demakas still did not recommend that Plaintiff
12 return to work (TR 549, 552).

13 Defendant responds that the ALJ met his burden by setting out a detailed and thorough
14 summary of the facts and conflicting evidence. Defendant further contends that it is clear
15 that the ALJ did not accept Dr. Demakas' statement that Plaintiff should not return to work
16 as Dr. Demakas' statement was incongruous with the fact that Dr. Demakas found nothing
17 of significance to support Plaintiff's subjective complaints. The Court agrees with the
18 Defendant. In his opinion, the ALJ addressed Dr. Demakas and his medical opinions as
19 follows:

20 John Demakas, M.D. reviewed the claimant's lumbar and cervical spine bone
21 scans as part of claimant's worker's compensation claim and determined that
22 increased activity in the areas were related to degenerative changes and that
only conservative care through a primary care physician was required. Dr.

23 that he meets Listing 1.04. Though this issue does not effect the Court's conclusion, it is the
24 Court's understanding that a positive Waddell test does not support the conclusion of
25 physical back injury. Rather, it indicates non-organic or psychological based pain or
26 malingering.

1 Demakas determined that there was nothing apparent in the bone scans to
2 indicate neurosurgical intervention and he was unable to find anything which
would explain claimant's complaints of numbness in his left leg.

3 ECF No. 10-2 at 24. The Court concludes the ALJ properly considered and addressed Dr.
4 Demakas' medical evidence and opinions.

5 **b. Dr. Van Gerpen**

6 Plaintiff also focuses on Dr. Van Gerpen's opinions which were accorded significant
7 weight by the ALJ. Plaintiff states that Dr. Van Gerpen never released Plaintiff to do
8 anything more than four hours of work per day, five days a week at a light-work level.

9 In his opinion, the ALJ addressed Dr. Van Gerpen and his medical opinions as follows:

10 Royce Van Gerpen, M.D. treated the claimant between May and August 2007
11 as part of his worker's compensation claim for complaints of neck and shoulder
12 pain and numbness in his left leg. Although Dr. Van Gerpen observed abnormal
13 head and neck motion by the claimant, which were also observed by the
14 undersigned during the hearing, a neurosurgical consultation provided no
15 explanation for this and no further evaluations or treatments of the claimant's
16 head and neck areas were recommended. In August 2007, Dr. Van Gerpen
17 indicated that the claimant had repetitively appeared at appointments with
significant and ongoing intoxication despite reporting the he was not consuming
alcohol. Repeated breath testing had documented this abnormality. Dr. Van
Gerpen opined that claimant's complaints concerning numbness in his leg
without any other explanation for its cause were most likely related to his
alcoholism. Dr. Van Gerpen also explained that the claimant's inability to
progress and return to full duty work were not due to the residuals of his work-
related injury.

18 ECF No. 10-2 at 24. The Court notes that Plaintiff's argument takes Dr. Van Gerpen's
19 medical records somewhat out of context. Specifically, Dr. Van Gerpen's April, 2007 record
20 cited by Plaintiff states:

21 We reviewed and discussed the light-duty job analysis is [sic] been provided by
22 the employer. This is a position where he can sit and stand at his choice and
23 handout brochures. Maximum weight allowance would be 2 pounds. I believe
24 that he is able to do this. The patient adamantly states that he is not able to be
up and about this amount and that he will go find another doctor to get a second
opinion. . . .

25 Plan: . . . Given clearance to do light duty work at 4 hours per day 5 days per
26 week for two weeks then advancing to 5 hours per day 5 days per week for the
next two weeks.

1 TR 369. Further, in June of 2007, Dr. Van Gerpen recommended Plaintiff remain on light
2 work at 4 hours per day (TR 539). In August of 2007, Dr. Van Gerpen recommended that
3 Plaintiff continue working and gradually increase his hours (TR 532). The Court finds no
4 errors by the ALJ in his consideration of Dr. Van Gerpen's medical opinions and records.

5 **c. Dr. Lahtinen**

6 Finally, Plaintiff argues that the ALJ erred by failing to consider Dr. Lahtinen's
7 opinions and failing to give specific and legitimate reasons supported by substantial evidence
8 for his rejection of Dr. Lahtinen's opinion. Defendant properly points out that a doctor's
9 opinion on disability is not a legal opinion and that such determinations are reserved for the
10 Commissioner.

11 In the ALJ's opinion, the ALJ addressed Dr. Lahtinen and his medical opinions at some
12 length. The ALJ stated, in part,

13 In any event, there are no records here to document visits between 2007 and
14 2009, despite the claimant's statement that he sees Dr. Lahtinen every month.
15 The undersigned has considered Dr. Lahtinen's opinions, but without any
16 medical records to document the diagnosis and treatment provided to the
17 claimant over the last two years to support the opinions, they are accorded little
weight. Moreover, the undersigned concludes that Dr. Lahtinen's opinions are
inconsistent with the well-supported assessments of other examining physicians,
discussed below, and the opinion of state agency medical consultants, both of
which are given greater weight.

18 ECF No. 10-2 at 23. The Court concludes that the ALJ properly accorded little weight to
19 Dr. Lahtinen's opinions that lacked medical records and that were inconsistent with the
20 well-supported assessments of other examining physicians and medical consultants.

21 In sum, the Court finds no errors in the ALJ's specific and cogent reasons for resolving
22 conflicts in medical opinions. The ALJ's rationale was detailed and specific and his findings
23 were based in substantial evidence.

24 **CONCLUSION**

25 Having reviewed the record and the ALJ's findings, the Court concludes the ALJ's
26 decision is supported by substantial evidence and is not based on legal error. Accordingly,

ORDER GRANTING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT - 9

1. Plaintiff's Motion for Summary Judgment, filed October 10, 2012, **ECF No. 15**, is **DENIED**.

2. Defendant's Motion for Summary Judgment, filed November 26, 2012, **ECF No. 19**, is **GRANTED**.

The District Court Executive is directed to file this Order and provide copies to counsel. Judgment shall be entered for Defendant and the file shall be **CLOSED**.

DATED this 15th day of July, 2013.

s/ Wm. Fremming Nielsen
WM. FREMMING NIELSEN
SENIOR UNITED STATES DISTRICT JUDGE